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10 Attorneys for Defendants, Counterclaimants, and Cross-Claimants:
11 REGAL STONE, LIMITED and FLEET MANAGEMENT LTD.
12

13 **UNITED STATES DISTRICT COURT**

14 **NORTHERN DISTRICT CALIFORNIA**

15 UNITED STATES OF AMERICA,

16 Plaintiff,

17 vs.
18

19 M/V COSCO BUSAN, LR/IMO Ship. No.
9231743 her engines, apparel, electronics,
20 tackle, boats, appurtenances, etc., *in rem*,
THE SHIPOWNERS' INSURANCE &
21 GUARANTY COMPANY LTD., REGAL
STONE, LTD., FLEET MANAGEMENT,
22 LTD., and JOHN COTA, *in personam*,

23 Defendants.
24

25
26 REGAL STONE, LTD., FLEET
MANAGEMENT LTD.,

27 Counter-Claimants,
28

) Case No. C 07 06045 (SC)
)
)

) IN ADMIRALTY
)
)

) **STIPULATION BETWEEN UNITED**
) **STATES OF AMERICA AND**
) **DEFENDANTS REGAL STONE**
) **LIMITED AND FLEET**
) **MANAGEMENT LTD. TO ALLOW**
) **FILING OF AMENDED ANSWER**
) **TO FIRST AMENDED**
) **COMPLAINT, AFFIRMATIVE**
) **DEFENSES AND**
) **COUNTERCLAIMS**
)

1	vs.)
2	UNITED STATES OF AMERICA,)
3	Counter-Defendant.)
4	REGAL STONE, LTD., FLEET)
5	MANAGEMENT, LTD.,)
6	Cross- Claimants,)
7	vs.)
8	STATE OF CALIFORNIA,)
9)
10	Cross-Defendant.)

On September 18, 2009, the parties to the above captioned matter filed a Joint Case Management Statement in Case Number 3:07-cv-05800-SC and the related cases which have been consolidated for pretrial purposes. On September 25, 2009, the parties attended the Case Management Conference before the Honorable Samuel Conti. Pursuant to section VI of the Joint Case Management Statement, page 23, the parties to the consolidated actions have agreed to allow the filing of amended pleadings without further stipulation or leave of court.

Defendants Regal Stone Limited and Fleet Management Ltd. now seek to file their Amended Answer To First Amended Complaint of the United States of America, Affirmative Defenses and Counterclaims. A copy of that document is attached hereto as "Exhibit 1." Subject to the reservations below, Plaintiff United States of America has no opposition to the filing of this document.

The foregoing stipulation of the United States is wholly without prejudice to its rights to answer, move, or otherwise respond to the

1 “Amended Answer to First Amended Complaint, Affirmative Defenses and
2 Counterclaims.” The foregoing stipulation by the United States is expressly
3 subject to, and conditioned upon, any and all claims, rights and defenses of
4 the United States and all terms, provisions and limitations of any and all
5 applicable waivers of sovereign immunity and conditions of subject matter
6 jurisdiction, none of which terms, provisions and limitations are waived,
7 either expressly or implicitly, including, but not limited to, any and all
8 terms, provisions and limitations pertaining to administrative claims filing
9 requirements and statutes of limitation.

10 Therefore, the parties hereby stipulate and request that the
11 Court accept the filing of Attachment 1 and deem it filed on November 6,
12 2009.

13
14 IT IS SO STIPULATED.

15
16
17 GREGORY KATSAS
18 Acting Assistant Attorney General
19

20 DATED: November 6, 2009

/s/ R. Michael Underhill
R. MICHAEL UNDERHILL
Attorney in Charge, West Coast Office
Torts Branch, Civil Division
United States Department of Justice

1 RONALD J. TENPAS
2 Assistant Attorney General
3 Environment and Natural Resources
4 Division

5 DATED: November 6, 2009

6 /s/ Bradley R. O'Brien
7 BRADLEY R. O'BRIEN
8 Senior Attorney
9 Environmental Enforcement Section
10 United States Department of Justice

11
12 DATED: November 6, 2009

13 /s/ John Cox
14 JOHN D. GIFFIN
15 JOSEPH A. WALSH II
16 JOHN COX
17 NICOLE S. BUSSI
18 Attorneys for REGAL STONE LIMITED
19 and FLEET MANAGEMENT LTD.



Exhibit “1”

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10 Attorneys for Defendants, Counterclaimants, and Cross-Claimants:
11 REGAL STONE LIMITED and FLEET MANAGEMENT LTD.
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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT CALIFORNIA**

15 UNITED STATES OF AMERICA,
16
17 Plaintiff,

18 vs.

19 M/V COSCO BUSAN, LR/IMO Ship. No.
9231743 her engines, apparel, electronics,
20 tackle, boats, appurtenances, etc., *in rem*,
THE SHIPOWNERS' INSURANCE &
21 GUARANTY COMPANY LTD., REGAL
STONE, LTD., FLEET MANAGEMENT,
22 LTD., and JOHN COTA, *in personam*,

23 Defendants.
24

25 REGAL STONE, LTD., FLEET
26 MANAGEMENT LTD.,

27 Counter-Claimants,
28

vs.

) Case No. C 07 06045 (SC)

)
) IN ADMIRALTY
)
)

) **AMENDED ANSWER TO FIRST**
) **AMENDED COMPLAINT,**
) **AFFIRMATIVE DEFENSES AND**
) **COUNTERCLAIMS OF**
) **DEFENDANTS REGAL STONE,**
) **LTD. AND FLEET MANAGEMENT**
) **LTD.**

1	UNITED STATES OF AMERICA,)
2)
3	Counter-Defendant.)
4	REGAL STONE, LTD., FLEET)
5	MANAGEMENT, LTD.,)
6)
7	Cross- Claimants,)
8)
9	vs.)
10	STATE OF CALIFORNIA,)
11)
12	Cross-Defendant.)

Defendant and Claimant to the vessel M/V COSCO BUSAN, REGAL STONE LIMITED ("Regal Stone") and Defendant FLEET MANAGEMENT, LTD. ("Fleet") (collectively referred to as "Answering Defendants") hereby answer Plaintiff UNITED STATES OF AMERICA's ("Plaintiff") First Amended Verified Complaint in this matter and assert counterclaims against the United States.

ANSWER TO FIRST AMENDED VERIFIED COMPLAINT

Answering Defendants respond to Plaintiff's First Amended Verified Complaint as follows:

1. Answering Defendants deny in their entirety those allegations contained in Paragraphs 8-11, 13, 14, 16, 17, 40, and 44 of Plaintiff's First Amended Verified Complaint.
2. Answering Defendants admit those allegations contained in Paragraphs 4, and 18-24 of Plaintiff's First Amended Verified Complaint.
3. Answering Defendants have insufficient information to respond to those allegations contained in Paragraphs 28, 36, 43, and 50 of Plaintiff's First Amended Verified Complaint, and therefore based upon their lack of information and belief, deny the allegations contained therein in their entirety.

1 4. To the extent that the Plaintiff incorporates by reference allegations
2 contained in Paragraphs 29, 34, 41, 45, 47, and 51 of Plaintiff's First Amended Verified
3 Complaint, Answering Defendants incorporate herein its responses thereto.

4 5. In response to Paragraphs 1-3, 30-33, 37-39, 42, 46, 48, 49, 52, and
5 53, of Plaintiff's First Amended Verified Complaint, Answering Defendants state that
6 the allegations contained state issues of law which require no answer. To the extent an
7 answer is required, Answering Defendants deny the allegations.

8 6. In response to Paragraph 5 of Plaintiff's First Amended Verified
9 Complaint, Answering Defendants admit that Defendant M/V COSCO BUSAN,
10 LR/IMO Ship No. 9231743, her engines, apparel, electronics, tackle, boats,
11 appurtenances, *etc.*, *in rem*, was flagged in Hong Kong. All other allegations contained
12 therein are denied in their entirety.

13 7. In response to Paragraph 6 of Plaintiff's First Amended Verified
14 Complaint, Answering Defendants admit Regal Stone is a foreign corporation head-
15 quartered in Hong Kong, that on November 7, 2007 Regal Stone owned the M/V COSCO
16 BUSAN, and that the M/V COSCO BUSAN was within this judicial district on
17 November 7, 2007. All other allegations contained therein are denied in their entirety.

18 8. In response to Paragraph 7 of Plaintiff's First Amended Verified
19 Complaint, Answering Defendants admit that on November 7, 2007 Regal Stone owned
20 the M/V COSCO BUSAN. All other allegations contained therein are denied in their
21 entirety.

22 9. In response to Paragraph 12 of Plaintiff's First Amended Verified
23 Complaint, Answering Defendants admit that Fleet is a foreign corporation head-
24 quartered in Hong Kong, that on November 7, 2007 Fleet was the technical manager of
25 the M/V COSCO BUSAN, and that the M/V COSCO BUSAN was within this judicial
26 district on November 7, 2007. All other allegations contained therein are denied in
27 their entirety.

1 10. In response to Paragraph 15 of Plaintiff's First Amended Verified
2 Complaint, Answering Defendants admit Fleet was the technical manager of the M/V
3 COSCO BUSAN on November 7, 2007. All other allegations contained therein are
4 denied in their entirety.

5 11. In response to Paragraph 25 of Plaintiff's First Amended Verified
6 Complaint, Answering Defendants admit that the allision with the Bay Bridge resulted
7 in the rupture of two of the M/V COSCO BUSAN's fuel tanks, thereby allowing a
8 portion of the M/V COSCO BUSAN's bunkers from one of the ruptured tanks to be
9 discharged into navigable waters of the United States and onto adjoining shorelines,
10 including navigable waters and adjoining shoreline of San Francisco Bay. In response
11 to the remaining allegations in Paragraph 25, Answering Defendants have insufficient
12 information to admit or deny the remaining allegations, and therefore based on their
13 lack of information and belief, Answering Defendants deny those allegations contained
14 therein in their entirety.

15 12. In response to Paragraph 26 of Plaintiff's First Amended Verified
16 Complaint, Answering Defendants admit the United States has expended and/or
17 sustained response costs and damages within the meaning of the Oil Pollution Act of
18 1990. Answering Defendants have insufficient information to admit or deny the
19 remaining allegations, and therefore based on their lack of information and belief, deny
20 those allegations in their entirety.

21 13. In response to Paragraph 27 of Plaintiff's First Amended Verified
22 Complaint, Answering Defendants admit that the COSCO BUSAN incident was
23 proximately caused by the acts, omissions, fault, and/or negligence of the pilot John
24 Cota. All other allegations contained therein are denied in their entirety.

25 14. In response to Paragraph 35 of Plaintiff's First Amended Verified
26 Complaint, Defendant Regal Stone admits it is a responsible party within the meaning
27 of the Oil Pollution Act of 1990. All other allegations contained therein are denied in
28 their entirety.

1
2 **AFFIRMATIVE DEFENSES**

3 In further answer to Plaintiff's First Amended Verified Complaint, and as
4 separate and distinct affirmative defenses, Answering Defendants allege the following
5 defenses:

6 15. AS A FIRST, SEPARATE, DISTINCT, AFFIRMATIVE DEFENSE to
7 Plaintiff's First Amended Verified Complaint, Answering Defendants allege that
8 Plaintiff's First Amended Verified Complaint and each and every allegation therein,
9 fails to state a claim upon which relief can be granted.

10 16. AS A SECOND, SEPARATE, DISTINCT AFFIRMATIVE DEFENSE
11 to Plaintiff's First Amended Verified Complaint, Answering Defendants are informed
12 and believe and thereon allege that, by exercise of reasonable efforts, Plaintiff could
13 have mitigated the amount of damages allegedly suffered, but Plaintiff failed and/or
14 refused and continues to fail and/or refuse, to exercise efforts to mitigate its damages,
15 and therefore Plaintiff's recovery, if any, must be barred or diminished accordingly.

16 17. AS A THIRD, SEPARATE, DISTINCT, AFFIRMATIVE DEFENSE
17 to Plaintiff's First Amended Verified Complaint, Answering Defendants allege that the
18 alleged damages for which Plaintiff seeks to hold the Answering Defendants liable,
19 resulted in whole or in part from the negligent, deliberate, intentional, reckless, and/or
20 unlawful acts or omissions of third parties, and Answering Defendants are not
21 responsible for or liable to Plaintiff for any such acts or omissions on the part of third
22 parties.

23 18. AS A FOURTH, SEPARATE, DISTINCT, AFFIRMATIVE DEFENSE
24 to Plaintiff's First Amended Verified Complaint, Answering Defendants allege that
25 Plaintiff has failed to join all indispensable parties as the State of California is an
26 indispensable party with respect to the United States' claims including claims for
27 damages to natural resources and therefore these claims should be dismissed if the
28 state is not joined as an indispensable party.

1 19. AS A FIFTH, SEPARATE, DISTINCT, AFFIRMATIVE DEFENSE to
2 Plaintiff's First Amended Verified Complaint, Answering Defendants allege that the
3 M/V COSCO BUSAN incident was caused, in whole or in part, by the negligence of the
4 United States, and its recovery must be reduced in proportion to its fault pursuant to
5 the doctrines of recoupment and/or setoff.

6 20. AS A SIXTH, SEPARATE, DISTINCT, AFFIRMATIVE DEFENSE to
7 Plaintiff's First Amended Verified Complaint, Answering Defendants allege that the
8 M/V COSCO BUSAN incident was caused, in whole or in part, by the negligence of the
9 United States, and Answering Defendants are entitled to indemnity and/or contribution
10 against any recovery that may be awarded in favor of Plaintiff.

11 21. AS A SEVENTH, SEPARATE, DISTINCT, AFFIRMATIVE
12 DEFENSE to Plaintiff's First Amended Verified Complaint, Answering Defendants
13 allege that this Court lacks subject matter jurisdiction over the United States' claims
14 brought under the Oil Pollution Act of 1990, because Plaintiff has failed to comply and
15 continues to fail to comply with the claims presentation requirement set forth in
16 33 U.S.C. § 2713(a)-(c).

17 22. AS AN EIGHTH, SEPARATE, DISTINCT, AFFIRMATIVE
18 DEFENSE to Plaintiff's First Amended Verified Complaint, Answering Defendants
19 allege this Court lacks subject matter jurisdiction with respect to the issue of whether
20 Answering Defendants have defenses to liability, or can limit their liability, under the
21 Oil Pollution Act of 1990 (33 U.S.C. §§ 2703, 2704), and whether Answering Defendants
22 can seek reimbursement of response costs and damages they have paid pursuant to
23 33 U.S.C. §§ 2708, 2713.

24 23. AS A NINTH, SEPARATE, DISTINCT, AFFIRMATIVE DEFENSE
25 to Plaintiff's First Amended Verified Complaint, Answering Defendants allege the
26 United States' forfeiture claim under the Marine Sanctuary Act must be dismissed
27 since no vessel was involved in the taking of marine sanctuary resources.
28

1 24. AS AN TENTH, SEPARATE, DISTINCT, AFFIRMATIVE
2 DEFENSE to Plaintiff's First Amended Verified Complaint, Answering Defendants
3 allege the United States' injuries, if any, were caused, in whole or in part, by its gross
4 negligence or willful misconduct, such that recovery by the United States against
5 Defendants is barred or limited by 33 U.S.C. § 2703(b).

6 25. AS A ELEVENTH, SEPARATE, DISTINCT, AFFIRMATIVE
7 DEFENSE to Plaintiff's First Amended Verified Complaint, Answering Defendants
8 allege the United States claims are barred by the doctrines of waiver and estoppel.

9 26. AS A TWELFTH, SEPARATE, DISTINCT, AFFIRMATIVE
10 DEFENSE to Plaintiff's First Amended Verified Complaint, Answering Defendant and
11 Claimant Regal Stone alleges that the forfeiture or partial forfeiture of the COSCO
12 BUSAN for the alleged violation of the National Marine Sanctuaries Act would be
13 grossly disproportionate or otherwise inappropriate to the gravity of the alleged
14 violations of the National Marine Sanctuary Act. The Court should therefore reduce or
15 eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines and
16 Penalties Clause of the Eighth Amendment of the United States Constitution.

17 27. As a THIRTEENTH SEPARATE, DISTINCT, AFFIRMATIVE
18 DEFENSE to Plaintiff's First Amended Verified Complaint, Answering Defendant and
19 Claimant Regal Stone alleges that the Court has discretion whether to forfeit the
20 COSCO BUSAN, if it finds that the statute authorizes such forfeiture, and that under
21 the circumstances of this case, the forfeiture of the vessel is not warranted.

22 28. .As a FOURTEENTH SEPARATE, DISTINCT, AFFIRMATIVE
23 DEFENSE to Plaintiff's First Amended Verified Complaint, Answering Defendant
24 Regal Stone alleges that under the circumstances of this case, the full forfeiture of the
25 vessel is not warranted.

26 29. AS A FIFTHTEENTH, SEPARATE, DISTINCT, AFFIRMATIVE
27 DEFENSE to Plaintiff's First Amended Verified Complaint, Answering Defendant
28 Regal Stone alleges that COSCO BUSAN oil spill resulted from an accidental allision

1 that occurred on state waters located more than 10 miles from the boundaries of a
2 marine sanctuary. Oil from the vessel subsequently drifted into national marine
3 sanctuaries. Forfeiture of the vessel under these circumstances is not authorized under
4 the National Marine Sanctuaries Act, and would exceed the powers delegated to the
5 United States under the United States Constitution, including the Commerce and
6 Property Clauses, and would thus be unconstitutional.

7 30. AS A SIXTEENTH, SEPARATE, DISTINCT, AFFIRMATIVE
8 DEFENSE to Plaintiff's First Amended Verified Complaint, Answering Defendant
9 Regal Stone alleges that, with respect to the United States' forfeiture claim, it is an
10 innocent owner whose interest in the vessel cannot be forfeited.

11 31. AS A SEVENTEENTH, SEPARATE, DISTINCT, AFFIRMATIVE
12 DEFENSE to Plaintiff's First Amended Verified Complaint, Answering Defendants
13 reserve the right to assert additional affirmative defenses.

14 **COUNTER-CLAIMS**

15 Defendants and Counter-Claimants Regal Stone, Ltd. ("Regal Stone") and
16 Fleet Management, Ltd. ("Fleet") (collectively "Counter-Claimants") allege:

17 32. The Court has jurisdiction over these counterclaims pursuant to
18 28 U.S.C. §§ 1331, 1333, 1345, 1346, & 2674, 33 U.S.C. § 2717, and 46 U.S.C. §§ 30101
19 & 30903.

20 33. Venue in this Court is proper because pursuant to 33 U.S.C § 2717(b)
21 and 46 U.S.C. § 30903. Moreover, these counterclaims are mandatory counterclaims to
22 the claims by the United States asserted in this Court.

23 34. Regal Stone, a Hong Kong based company, was, on or about
24 November 7, 2007 and at all times relevant hereto, the owner of the vessel M/V COSCO
25 BUSAN ("COSCO BUSAN"). The COSCO BUSAN is a vessel in excess of 300 gross
26 tons.

27 35. Fleet, a Hong Kong based company, was, on or about November 7,
28 2007 and at all times relevant hereto, the technical manager of the COSCO BUSAN.

1 36. John J. Cota ("Pilot Cota") boarded the COSCO BUSAN as a
2 compulsory pilot on November 7, 2007 as required by California law, and navigated the
3 vessel west from the Port of Oakland towards the San Francisco-Oakland Bay Bridge.

4 37. Under Pilot Cota's compulsory pilotage, the COSCO BUSAN
5 discharged approximately 53,000 gallons of fuel oil in the San Francisco Bay (the
6 "Incident"). Regal Stone, as the owner of the vessel, was designated the Responsible
7 Party by the United States under the Oil Pollution Act of 1990 ("OPA '90") and by the
8 State of California, Office of Spill Prevention and Response.

9 38. As a result of being designated the Responsible Party, Regal Stone
10 has been required to, among other things, pay for removal costs for the November 7,
11 2007 oil spill as well as other damages, disbursements and costs relating to that
12 incident including, but not limited to: the cost to repair the COSCO BUSAN, loss of
13 hire, port fees and expenses, crew wages and expenses, loss of use, response costs and
14 cleanup expenses, consultants' and specialist fees, natural resource damages,
15 assessment costs, third party claims, claims by municipalities and government agencies
16 and/or class action lawsuits, litigation costs, attorneys fees and civil penalties. The
17 complete costs and damages are undetermined at this time, but will be ascertainable
18 once the cleanup, response, natural resource damage assessment and litigation are
19 completed, but are expected to be in excess of \$60,000,000.

20 39. The counterclaims arise from the allision of the COSCO BUSAN and
21 the San Francisco to Oakland Bay Bridge on November 7, 2007, and the subsequent
22 discharge of bunker fuel from the COSCO BUSAN into the waters of the San Francisco
23 Bay.

24 40. The counterclaims arise from injuries to natural resources within the
25 waters of the San Francisco Bay and the Pacific Ocean resulting from the Incident and
26 damages arising there from.

1 41. The United States of America alleges that it has incurred response
2 costs, damages and other disbursements resulting from the discharge of bunkers from
3 the COSCO BUSAN. It seeks recovery of these amounts from Regal Stone and Fleet.

4 42. The United States has waived sovereign immunity with respect to
5 the claims asserted in these counterclaims, pursuant to 28 U.S.C. §§ 2674, 2675, and 46
6 U.S.C. §§ 30101 and 30903.

7 43. At the time of the Incident, Pilot Cota held a merchant mariner's
8 license issued by the United States Coast Guard. Possession of such a license by Pilot
9 Cota was a prerequisite to qualifying to pilot vessels on the waters of San Francisco
10 Bay.

11 44. Pilot Cota was medically unfit and incompetent to perform the duties
12 required by his United States Coast Guard license. Pilot Cota suffers from numerous
13 medical conditions including sleep apnea and depression. For several years prior to the
14 Incident and within the knowledge of the United States, Pilot Cota had been taking a
15 long list of disqualifying prescription medications including valium for sleep and
16 Provigil to keep him awake. Pilot Cota's medical condition and his use of prescription
17 medications resulted in the impairment of his cognitive abilities and contributed to his
18 lack of situational awareness.

19 45. In 2006 and 2007, Pilot Cota disclosed to the United States Coast
20 Guard his medical conditions and use of medications that rendered him unfit for duty,
21 medically disqualified and prone to periods of confusion (lack of situational awareness).

22 46. Prior to November 7, 2007, the United States knew or should have
23 known of Pilot Cota's disclosures, medical history and/or medical condition prior to the
24 incident.

25 47. The United States was negligent in licensing Pilot Cota, insofar as it
26 failed to determine that Pilot Cota was not medically fit for duty pursuant to the
27 applicable regulations. Specifically, despite Pilot Cota's medical history and medical
28 condition prior to the accident, all known to the United States Coast Guard, the United

1 States Coast Guard failed to suspend or revoke his license. In essence, the United
2 States Coast Guard failed to “guard the coast” by failing to suspend or revoke Pilot
3 Cota’s license.

4 48. Pilot Cota’s personal history prior to the Incident includes
5 convictions for driving under the influence (DUI) offenses in 1971 and again in 1998,
6 and completion of a 30-day Alcohol and Chemical Recovery Program in March 1999.

7 49. On November 30, 1999, the United States Coast Guard’s National
8 Maritime Center “Medical Waivers” staff issued a license waiver because of Pilot Cota’s
9 condition and ongoing treatment. The document from the National Maritime Center
10 required that a waiver statement be physically placed on his license when it was issued.
11 On January 4, 2000, the United States Coast Guard negligently issued a license to Pilot
12 Cota and failed to note any indication of medical conditions or waiver on that license.

13 50. Following the Incident, and even before completing a comprehensive
14 investigation of the Incident, the United States Coast Guard suspended Pilot Cota’s
15 license based solely on the medical disclosures made by him in January 2007, some ten
16 months prior to the incident. Had the United States Coast Guard properly evaluated
17 Pilot Cota’s written disclosures about his medical conditions and use of certain
18 prescription medicines, he would never have been allowed to pilot COSCO BUSAN on
19 the day of the Incident.

20 51. The United States Coast Guard negligently allowed Pilot Cota to
21 maintain and renew his Coast Guard license, and failed to annotate the waiver on Pilot
22 Cota’s license. The United States negligence included, but is not limited to, its failure
23 to revoke Pilot Cota’s license and its decision to renew his license.

24 52. If the United States Coast Guard had properly reviewed Pilot Cota’s
25 license application and disclosures in accordance with its own procedures and prior
26 recommendations of the National Transportation Safety Board following the STAR
27 PRINCESS grounding and the tragic Staten Island Ferry incident, it would not have
28

1 renewed Pilot Cota's licenses in 2006 and again in 2007 and the November 7, 2007
2 Incident would not have occurred.

3 53. The United States Coast Guard was a member of the Harbor Safety
4 Committee for the San Francisco Bay Region ("HSC"). The HSC was formed to develop
5 recommendations for the safe navigation and operation of vessels within San Francisco
6 Bay. The HSC developed a Harbor Safety Plan for San Francisco Bay. In 2007, the
7 Harbor Safety Plan stated that "Vessels within the Bay at a dock or at a safe anchorage
8 should not commence movement if visibility is less than .5 nautical mile throughout the
9 intended route, unless the operator's assessment of all variables is that the vessel can
10 proceed safely.

11 54. The United States Coast Guard operates a Vessel Traffic Service
12 ("VTS") for San Francisco Bay. United States employees working at the VTS were
13 aware that the fog on the morning of November 7, 2007 was very dense, and that
14 visibility was less than ¼ mile along the route between the Port of Oakland and the
15 seaward entrance of the Bay.

16 55. VTS employees were aware that pilot Cota intended to navigate the
17 COSCO BUSAN from its berth in Oakland, through San Francisco Bay, to the pilot
18 station in the Pacific Ocean, through areas blanketed by dense fog with visibility far
19 below the recommended .5 nautical mile minimum specified in the Harbor Safety Plan.

20 56. The purpose of the VTS program is to promote safe navigation,
21 prevent maritime accidents, and protect lives, property and the environment from harm
22 that can result from maritime accidents. VTS operators have the responsibility to
23 communicate with vessels such as the COSCO BUSAN when those vessels are
24 preparing to transit through waters that are covered by the San Francisco VTS
25 program, to notify and advise such vessels of hazards or risks they may encounter, to
26 recommend action when such recommendations may help to avert a casualty, and in
27 some cases, to direct the vessel to take evasive action.
28

1 57. Although the VTS employees knew, or should have known, of the
2 Harbor Safety Plan recommendations regarding departing a berth when visibility was
3 less than 0.5 nautical miles, and knew that visibility along the intended route of the
4 COSCO BUSAN was substantially less than 0.5 nautical miles, the VTS employees who
5 communicated with the COSCO BUSAN on the morning of November 7, 2007, did not
6 advise the master or pilot of the Harbor Safety Plan recommendations, or recommend
7 that the vessel remain at its berth. Moreover, knowing that Capt. Cota intended to
8 depart the berth in heavy fog, the VTS did not closely monitor the movement of the
9 vessel, and only discovered it had deviated from its intended course until shortly before
10 the allision.

11 58. As the COSCO BUSAN was approaching the Bay Bridge, the United
12 States Coast Guard Vessel Traffic Service ("VTS") for the San Francisco Bay knew that
13 the vessel was off track and standing into danger. VTS owed and/or assumed a duty to
14 timely monitor vessel traffic within the VTS system, and to competently intervene by
15 issuing advisements, warnings and/or directions in the event a vessel in the VTS
16 system is off course, in peril and/or otherwise standing into danger.

17 59. VTS breached its duties: by failing to advise the master of the Harbor
18 Safety Plan recommendation regarding departing the berth when visibility was less
19 than 0.5 nautical miles, failing to recommend that the vessel remain at its berth, failing
20 to properly monitor the vessel's movement, failing to make timely contact with Pilot
21 Cota, providing Pilot Cota with inaccurate information, failing to warn Pilot Cota of
22 the impending danger, and failing to direct, order and/or use its authority to command
23 that the pilot change his intended track, steer away from the danger, change course,
24 reverse engines, or otherwise maneuver so as to avoid the bridge tower.

25 60. Moreover, instead of taking action to properly and timely monitor,
26 advise, warn and/or direct the Pilot Cota away from the peril so that the vessel would
27 not allide with the bridge, VTS operators placed bets and/or wagers among themselves
28 as to whether the vessel would pass safely or strike the bridge.

1 61. VTS further breached the duties it owed and/or assumed to Regal
2 Stone, Fleet, the public, and the environment by abandoning its role and mission to
3 properly monitor, advise, warn and direct vessel traffic.

4 62. Counter-Claimants presented a written claim to the United States
5 Coast Guard more than 6 months before the date of this amended counterclaim, seeking
6 recovery of their damages. To date, the United States has not responded to this claim.

7 **FIRST COUNTER-CLAIM**

8 **Recoupment And Setoff**

9 63. Counter-Claimants reallege and incorporate by reference the
10 allegations contained in paragraphs 27 through 62 of their counterclaims.

11 64. The allision and discharge of bunker fuel from the COSCO BUSAN
12 into the navigable waters of San Francisco Bay, the Pacific Ocean and adjoining
13 shorelines resulted from the negligence of the United States.

14 65. The discharge of bunker fuel from the COSCO BUSAN into the
15 navigable waters of San Francisco Bay, the Pacific Ocean and adjoining shorelines
16 resulted from the gross negligence and/or willful misconduct of the United States.

17 66. As a consequence of the United States' negligence, gross negligence,
18 or willful misconduct, Counter-Claimants have sustained costs, damages, and losses
19 and continue to sustain costs, damages and losses. They are entitled to the remedy of
20 setoff or recoupment, up to the full value of the United States' claims asserted against
21 them.

22
23 **SECOND COUNTER-CLAIM**

24 **General Maritime Law**

25 67. Counter-Claimants re-allege and incorporate by reference the
26 allegations contained in paragraphs 27 through 66 of their counterclaims.

27 68. The tortuous conduct of the United States was a direct, proximate,
28 and substantial cause of the allision and discharge of bunker fuel onto navigable waters

1 and adjoining shorelines, and caused injury to natural resources. It also resulted in
2 damage to the vessel and the San Francisco-Oakland Bay Bridge and caused Fleet and
3 Regal to incur other damages including, without limitation, loss of charter hire, the
4 costs to respond to the oil spill, and the costs of experts, consultants, and attorneys.
5 The amount of Fleet and Regal Stones damages exceeds \$75,000,000.

6 69. The United States has waived its sovereign immunity to
7 Counterclaims claims under the Federal Tort Claims Act, the Suits in Admiralty Act,
8 and/or the Extension of Admiralty Jurisdiction Act.

9 70. Counter-Claimants have incurred, and will continue to incur costs,
10 damages, and losses caused directly and proximately by the United States' tortious acts
11 and omissions.

12 71. The United States is liable to Counter-Claimants for their damages,
13 to the extent they were caused by the United State's negligence, gross negligence, or
14 willful misconduct, under the general maritime law.

15 **THIRD COUNTER-CLAIM**

16 **Contribution**

17 72. Counter-Claimants reallege and incorporate by reference the
18 allegations contained in paragraphs 27 through 71 of their Counterclaims.

19 73. The negligence, gross negligence, or willful misconduct of the United
20 States was a direct, substantial and proximate cause of the allision and discharge of
21 bunker fuel onto navigable waters, damages to third parties, and injuries to natural
22 resources.

23 74. Counter-Claimants have been sued by Third Parties, including the
24 State of California, commercial fishermen, and the City of San Francisco for losses and
25 damages alleged to have been caused by the allision and oil spill. These parties have
26 asserted claims under California law, the general maritime law, and the Oil Pollution
27 Act of 1990.

1 75. Counter-Claimants have or will fully compensate these Third Parties
2 for their losses, thereby releasing and discharging the United States from its liability to
3 these claimants for its proportionate share of their losses.

4 76. The United States is liable in contribution under the general
5 maritime law, California law, or the Oil Pollution Act of 1990 to Counter-Claimants for
6 its proportionate share of the damages of these Third Party claimants.

7
8 WHEREFORE, Regal and Fleet pray for the following relief:

- 9 1. The United States' claims be dismissed against them with prejudice;
10 2. The *in rem* claims against the M/V COSCO BUSAN be dismissed
11 with prejudice;
12 3. The forfeiture claim be dismissed on the grounds that Defendant and
13 Claimant Regal Stone was and is an innocent owner;
14 4. The Court eliminate or reduce any forfeiture on the grounds that
15 forfeiture of the vessel would be grossly disproportionate to the alleged violations of the
16 National Marine Sanctuary Act, and a violation of the Excessive Fines and Penalties
17 Clause of the Eight Amendment to the United States' Constitution;
18 3. That the Court enter judgment in their favor on the United States'
19 claims against them;
20 4. That the Court rule in their favor on their counter-claims against the
21 United States;
22 6. For an award of costs and attorney's fees incurred by them in this
23 matter; and
24 8. For all other relief to which they may be entitled at law or in equity.
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4 DATED: November 6, 2009

/s/ John Cox

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